

Book Review

Jay Folberg and Ann Milne, *Divorce Mediation Theory and Practice*
(New York: The Guilford Press 1988).

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Divorce Mediation Theory and Practice, is a collection of twenty-three essays which are edited, and at times authored, by an interdisciplinary team. Jay Folberg, who is currently the Dean at the University of San Francisco School of Law, has written and taught about mediation and family law for years.¹ Ann Milne, a certified social worker with a private practice in Madison, Wisconsin, also has a long involvement with divorce mediation, about which she has written extensively.² These editors place divorce mediation "at the intersection of several professional practices,"³ and seek to deal with both its legal and emotional dimensions. Because they believe that divorce mediation can be "fully understood and realistically assessed only from an interdisciplinary perspective,"⁴ they have collected articles by psychologists, lawyers, social workers, anthropologists, sociologists, communication experts, and others working in the field of divorce mediation. Folberg and Milne say that they have written this book to provide a foundation upon which a new mediator can build with training and experience as well as to offer refinements and insights to the experienced practitioner.⁵

Unfortunately, this multidisciplinary approach, aimed at beginners and experts alike, creates more breadth than depth, and so may frustrate both audiences. There is not enough basic information to instruct the novice, nor is there sufficient analytic depth to satisfy the expert. The book is somewhat like dining in a cafeteria, offering a surfeit of dishes to

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1. Jay Folberg graduated from San Francisco State University and received his J.D. from the University of California at Berkeley. He has served as President of the Association of Family and Conciliation Courts, Chairman of the Mediation and Arbitration Committee of the American Bar Association Family Law Section and distinguished affiliate member of the American Association of Marriage and Family Therapists.

2. Ann Milne graduated from the University of Wisconsin and received her masters in social work (A.S.C.W.) from the University of Wisconsin. She has been on the Board of Directors of the Academy of Family Mediators and is the Executive Director of the Association of Family and Conciliation Courts. She is a member of the Wisconsin Association of Mediation.

3. J. FOLBERG & A. MILNE, *DIVORCE MEDIATION THEORY AND PRACTICE*, ix (1988).

4. *Id.*

5. *Id.* at x.

choose from, but none which are truly excellent. What is missing from this collection of articles is an integrated structure of thoughtful editorial reflections which could provide a common theme to weave the book into a cohesive whole. Instead, the editors have chosen to limit their nonauthorial contributions to sketchy headnotes which introduce the articles with brief summaries of their contents.⁶ Furthermore, they have not edited out repetitive information, so that the articles repeat each other to a distressing degree.

Organizationally, the book is divided into six sections which include: divorce mediation in perspective, divorce mediation theory and dimensions, the practice of divorce mediation, divorce mediation techniques and strategies, legal and ethical issues in divorce mediation, and divorce mediation research and analysis. This structure does not provide organizational clarity, so that the reader seeking specific information is forced to flip back and forth a good deal.

In chapter 1, the editors seek to give an overview of divorce mediation. In a sense, this chapter mirrors the flaws of the book as a whole, claiming to include "an overview of the emerging theory and practice of divorce mediation. . . . [A] comprehensive perspective of what mediation is, its conceptual framework, how it is practiced, and critical issues facing the field"⁷ - all in twenty pages! Of course, an effort to accomplish so much in so little space can only provide superficial information and disappoint the reader.

The first section continues with an article by Milne on the nature of divorce disputes, which has some interesting material on how the mediator can diagnose conflicts in divorce so as to move towards the appropriate solution. The piece would be improved if it balanced its discussion of the psychological aspects of divorce and avoided a wholesale condemnation of the legal system. Chapter 3 gives an anthropological overview of how different cultures process disputes. Unfortunately, it is too summary to provide much valuable information, covering the multicultural universe of dispute resolution in twelve pages. Stylistically, the essay is flawed by the repeated use of rhetorical questions, rather than making clear points. For example, after saying that men choose mediation to maximize advantages while women choose it for the values it represents, the author asks "What are the possible consequences of these differences in motivation?"⁸ A discussion of the possible consequences would be far

6. In contrast, L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987) is an example of a text, albeit a casebook, where the authors have carefully connected and illuminated excerpts and contributions so that the entire book is integrated.

7. J. FOLBERG & A. MILNE, *supra* note 3, at 3.

8. *Id.* at 56.

more helpful to the divorce mediator than the mere posing of the question.

Chapter 4, which begins the section on Theory and Dimensions, is one of the best articles in the book. Author Allison Taylor, who co-authored Jay Folberg's earlier mediation text,⁹ gives a clear conceptual framework of divorce mediation which contains enough detail to be useful. She includes images of the process as explanatory vehicles and describes applicable techniques to illustrate the mechanics. This chapter contains the sort of material that the book promises, foundation information for students of divorce mediation as well as insights for experienced practitioners.

Chapters 5 and 6 are more disappointing. Their presentations of the psychological and legal dimensions of divorce mediation seem superficial and lacking in useful information. Kaslow's discussion of the psychodynamics of divorce summarizes previously published information on the stages of divorce, and then links this to the stages of mediation without shedding significant light on process or techniques. Erickson's article on the legal dimensions seems more a glowing advertisement for mediation than a balanced analysis of its legal dimensions. Complex legal issues inherent in divorce mediation are glossed over in his superficial portrait of reframing as the vehicle to produce win-win harmonious resolutions.¹⁰

Chapters 7 through 12 describe various providers of divorce mediation: mental health practitioners, lawyers, court-annexed programs, mandatory programs (also court-annexed), co-mediators, and structured mediators. Each of these articles is interesting and descriptive, but only Emily Brown's chapter on mental health mediation gives a realistic, self-critical evaluation of strengths and weaknesses of the provider. The others merely recount how they offer their services.

Chapter 11, "Lawyer and Therapist Team Mediation," by Lois Gold, unfortunately stereotypes the roles of the legal and mental health professions, seeing the therapist's job as responding to feelings while the lawyer handles fact and law issues. "The focus of the therapist is to improve communication, identify the underlying issues and deal with emotional conflict that interferes with negotiations. The lawyer provides information about statutes, case law, and local judicial tradition. . . . The law-

9. J. FOLBERG & A. TAYLOR, *MEDIATION - A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984).

10. For a more comprehensive treatment, see S. ERICKSON & M. ERICKSON, *FAMILY MEDIATION CASEBOOK* (1989).

yer is trained to *give* information, and the therapist is trained to *elicit* information."¹¹

This is a distressingly narrow view of the role of the lawyer, which sounds as if the attorney's place in the mediation team could be taken by Lexis or Westlaw. Many of today's generation of lawyers have been trained in interviewing techniques which include issue identification, emotional content, and effective communications. Indeed, the phrase "feelings are facts" is found in a law school text.¹² Furthermore, lawyers cannot *give* information until they have *elicited* sufficient information to know what is relevant.

Part Four, *Divorce Mediation Techniques and Strategies*, is the most useful part of this book. These articles achieve greater depth and contain valuable detailed information. Although Chris Moore's article repeats some information contained in his own mediation text,¹³ he gives an excellent description of the sphere of conflict and suggests specific strategies for breaking conflicts which are based in the different sections of the sphere, such as data conflicts, interest conflicts, structural conflicts, and value conflicts. John Haynes' chapter, which also repeats information from his own book on divorce mediation,¹⁴ has a discussion of power balancing which contains an excellent analysis of the sources of power and describes strategies to use in balancing power, enriched with useful examples and illustrations.

Chapter 15 contains a fascinating analysis of communications strategies and gives guidelines for making competent communication decisions in mediation. The authors divide tactics into more or less directive categories and relate them to the communications skills of the mediator. The authors code and analyze the language and interactions which occurred in twenty divorce mediations and present a solid data base to support their belief in the importance of specific communication skill training for mediators.

Part Five of the book deals with legal and ethical issues in divorce mediation. Jay Folberg, who has written extensively about mediation¹⁵

11. FOLBERG & MILNE, *supra* note 3, at 210-11. This dichotomous view is echoed in Chapter 7.

12. T. SCHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1976).

13. C. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986).

14. J. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* (1981).

15. Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413 (1985); Folberg, *Mediation*, 4 FAM. L. & PRAC. ch. 55 (1985); Folberg, *The Resolution of Family Conflict: Comparative Legal Perspectives*, in *DIVORCE MEDIATION - THE EMERGING AMERICAN MODEL* 193 (1984); Folberg & Taylor, *supra* note 9; Folberg, *Divorce Mediation, Promises and Pitfalls*, 3 ADVOCATE 4 (1983); Folberg, *A Mediation Overview*:

contributes two chapters, one on confidentiality and privilege and the other on liability. While both are repetitious of materials which have appeared elsewhere,¹⁶ they are solid, analytical pieces containing important information for those who are new to these issues. Additionally, Folberg cross-references other materials in the book throughout each chapter, making these the most contextually integrated articles in the book. One concern common to both pieces is that Folberg seems to be exclusively addressing a legally trained audience, using terms which may not be readily accessible to nonlawyers such as the mental health professionals to whom so much of this book is directed. His chapter on liability would be improved by a more complete discussion of the areas of common legal pitfalls in divorce malpractice, such as tax consequences, pensions and retirement benefits, characterization of property, tracing, insurance, interim orders, discovery, conflict and source of law problems, etc. Also, the subject of training and licensing cry out for more than the cursory mention they receive in the concluding paragraph.

Silberman's article on ethical constraints from a legal perspective presents a classical analysis of the concerns presented by the model code¹⁷ and the model rules.¹⁸ Unfortunately, much of her material is based on ethical opinions which were published before 1983, thereby missing the increasingly liberal interpretations found in more recent opinions.¹⁹ Absent from this chapter is a discussion of the ethical dilemmas inherent in a law office practice where both the services of mediation and adversary representation are offered. At the initiation of the

History and Dimensions of Practice, 1 MED. Q. 3 (1983); Folberg, *Alternative Means of Family Dispute Resolution*, in DIVORCE MEDIATION - A WORKABLE ALTERNATIVE 11 (1982).

16. See, e.g., N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW, chs 4, 8 (1987); Riskin, *Towards New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 353, 359-61 (1984); Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DIS. RES. 47 (1986); Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984); Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986); Freedman & Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DIS. RES. 37 (1986); McIsaac, *Confidentiality: An Exploration of Issues*, 8 MED. Q. 57 (1985); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984); AMERICAN BAR ASSOCIATION, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE (1985).

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983).

19. See, e.g., Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325 (1988); Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CALIF. L. REV. 1093 (1987); Note, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethical Gap?*, 65 WASH. U. L. Q. 223 (1987); Casenote, *Ethical Considerations of Divorce Mediation: Formal Ethics Opinion No. 488*, 21 WILLAMETTE L. REV. 645 (1985).

relationship, it is difficult to elicit from and give to the client sufficient information to permit him or her to make an informed choice about the process without entering into a lawyer-client relationship which may prohibit the attorney or the office from assuming the role of mediator.²⁰

Author Milne's chapter on ethics from a mental health perspective contains the same sort of integrative references to other materials in the book which enrich the chapters by Folberg. She also has a more thorough discussion of issues relating to competence and training. Her discussion of the risk of unauthorized practice of law faced by mental health mediators, however, does not treat the subject with adequate depth.

The final chapter in this section, Bishop's Standards of Practice for Divorce Mediators, explains the A.B.A.,²¹ A.F.M.,²² and A.F.C.C.²³ standards, all of which he helped to draft. The article reads like a mini-legislative history and gives a useful summary and comparison of the three codes. It might have been valuable to include a more critical discussion of controversial areas of the codes, such as those relating to competence, training, regulation, and licensing, but the chapter is nonetheless worthwhile.

The book concludes with a section on divorce mediation research and analysis, containing three chapters by long-term researchers in the field. Unfortunately, the studies which form the basis for these chapters were conducted between 1979 and 1983, giving rise to the concern that, because they deal with such a young and volatile field as divorce mediation, they were out of date before they were published in this book. Much of the data are almost a decade old, and during that decade there have been enormous changes in the field of divorce mediation: a proliferation of court-annexed programs; increasing acceptance by the legal profession; increasing public understanding; and rapid expansion of training courses and degree programs. This leaves the reader wondering whether the attitudes towards mediation voiced in the studies would still be true today.

Joan Kelly's chapter comparing persons who have chosen mediated and adversarial divorces is particularly interesting. She shows that in many ways the two groups are indistinguishable, including their marital history, level of anger, and degrees of cooperation. The major differences seem to lie in how the participants perceive their spouses and in their psychological reactions to divorce. The study shows that while mediation

20. See MODEL CODE OF RESPONSIBILITY Rule 1-7, 1-6; DR 4-101, DR 5-101 (1969).

21. American Bar Association.

22. Academy of Family Mediators.

23. Association of Family and Conciliation Courts.

does not reduce short-term psychological distress, it does promise a more cooperative long-term relationship.

In the research material described in the last section, and in virtually all of the book, the underlying data, statistics, and supporting material seem out of date. One has the sense that the articles which make up the book were largely compiled between 1984 and 1986.²⁴ Yet the book was not published until 1988. Even the editors, who surely had the opportunity for timely additions, rely on old and shaky data. For instance, in Chapter 1, Folberg and Milne claim that far fewer lawyers than mental health professionals provide mediation, basing this on research conducted in 1981 and published in 1983.²⁵ In the decade since this survey was conducted, however, the legal profession has not only made vast strides in understanding and accepting mediation, but also in trying to capture it as part of the practice of law.²⁶ Thus today, there are many more lawyer mediators than there were in 1981. The presence of these lawyer mediators is shaping the development of divorce mediation, and should not be ignored by use of outdated statistics.

Another weakness in Chapter 1 which is echoed throughout the book is the cursory treatment of co-mediation, which receives only a paragraph of coverage in over five pages of text dealing with the practice of mediation. In most of the chapters, mediation is only discussed from the

24. Indeed, the book was described as forthcoming in 1986, see Book Review, 84 MICH. L. REV. 1036, 1037 n.4 (1986), and cited by author Gold as due for publication in 1985; Gold, *Interdisciplinary Team Mediation* in ABA DIVORCE MEDIATION READINGS 189 (1985).

25. Indeed, the data which purport to show that lawyers comprise 15.4% of private mediators, while mental health professionals constitute 78% in the private sector and 90% in the public sector, are suspect for their methodological underpinnings as well as for their age. Pearson, *et. al.* obtained the data on professional backgrounds by mailing questionnaires to court-connected family counselling services, members of the Association of Family and Conciliation Courts, those who had attended A.F.C.C. conferences, and to 800 members of the Family Mediators Association. This population, drawn from groups which are heavily mental health oriented, is not a representative universe for sampling the demographics of all mediators. J. Pearson, M. Ring, & A. Milne, *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION COURTS REVIEW 1 (June 1983).

26. Casenote, *supra* note 19, at 649-50 ("Commentators generally agree that a divorce mediator requires legal skills Members of the organized bar, however, emphatically argue that divorce mediation must be practiced by lawyers . . . '[t]he unbridled and undisciplined delivery into this area of law by non-lawyers is the antithesis of the fundamental protection we find in the concept that we are a nation under law, not men'."). See also Comment, *The Attorney Mediators: Protection Through Representation*, 92 DICK. L. REV. 811 (1988); Hobbs, *supra* note 19; Riskin, *supra* note 16; Pirie, *The Lawyer as Mediator: Problems or Professional Problems?*, 63 CAN. B. REV. 378 (1985).

perspective of solo mediation.²⁷ This is an unfortunate bias, because while co-mediation may be more expensive and more logistically complex than solo mediation, it serves as an ideal training vehicle and offers the long-term benefits of collaborative support, balance of perspectives, protection against error, and the safety net of having two people share the process responsibilities.

Ultimately, this book, although it includes contributions from some of the most famous individuals in the field of divorce mediation, is a disappointment. The articles are overwhelmingly repetitive, uniformly admiring of divorce mediation and uniformly despising of the traditional adversary system. This lack of balance is reflected in the way the book ignores important criticisms which have been leveled against divorce mediation, namely, that women, minorities, and the disadvantaged fare poorly in mediation,²⁸ and that abusive relationships do not belong in mediation.²⁹ The book also fails to give serious consideration to the difficult issue of competence, including mediator background, training, experience, and certification. There is a total absence of focus on children in divorce,³⁰ no discussion of what the attitude and position of the mediator might be on parenting and other controversial divorce issues, and no description of the growth of med-arb, especially in court-annexed programs where its efficiency makes it increasingly popular.³¹

In sum, what is contained in this book is a collection of articles which are usually interesting, sometimes valuable, often biased, frequently outdated, and repeatedly repetitious; all missing an editorial cohesiveness. This seems like too many flaws for a book of such great length (508 pages) and high cost (\$39.95), particularly when so much more should have been included.

27. See, e.g., ch. 1, 4, 7, and 9. Even in the chapter specifically dealing with co-mediation, the author notes that her organization stopped using it because "our experience allowed us to be comfortable mediating alone." Folberg and Milne, *supra* note 3, at 222.

28. See, e.g., Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REVIEW 431 (1985); Delgado, Dunn, Brown, Lee, & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REVIEW 266 (1984).

29. See, e.g., Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. (1984).

30. J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN, A DECADE AFTER DIVORCE* (1989); W. HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY* (1986); J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

31. Morris, *Mandatory Custody Mediation: A Threat to Confidentiality*, 26 SANTA CLARA L. REV. 745, 746 (1986).